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IN THE

Supreme Court of the United States

LUZ HELLMAN,

Petitioner,

v.

SHELDON WEISBERG and STATE OF ARIZONA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are repeated unfulfilled threats of job termination and criminal prosecution insufficient as a matter of law to constitute "adverse employment action" that supports an employee's retaliation claim?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iv
TABLE OF CITED AUTHORITIES	v
DECISIONS BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	6
I. TITLE VII WILL FAIL TO PROTECT EMPLOYEES IF EMPLOYERS ARE ALLOWED TO RETALIATE BY THREATS.	6
A. THREATS CONSTITUTE ADVERSE EMPLOYMENT ACTION.	6
B. THREATS COUNT AS PART OF A HOSTILE WORK ENVIRONMENT.	11

Contents

Page

C. IF ALLOWED TO STAND, THE DECISION WILL SEVERELY UNDERCUT TITLE VII PROTECTION. 15

II. THE DECISION BELOW CONFLICTS WITH THE NINTH CIRCUIT'S OWN DECISIONS AND THOSE OF OTHER CIRCUITS. 18

CONCLUSION 23

TABLE OF APPENDICES

Page

Appendix A — Memorandum Of The United States Court Of Appeals For The Ninth Circuit Filed December 23, 2009 ..... 1a

Appendix B — Order Of The United States District Court For The District Of Arizona Filed November 29, 2007 ..... 7a

Appendix C — Letter From Karen L. Ferguson, Supervisory Civil Rights Analyst, Employment Litigation Section, U.S. Department Of Justice, Civil Rights Division To Luz M. Hellman Dated April 27, 2007 ..... 30a

Appendix D — Letter From William Ryan, Enforcement Supervisor, U.S. Equal Employment Opportunity Commission To Luz M. Hellman With Dismissal And Notice Of Rights Dated March 9, 2006 ..... 33a

Appendix E — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing Filed February 1, 2010 ..... 37a

Appendix F — 42 U.S.C. § 2000e-3 ..... 38a

Appendix G — 42 U.S.C. § 1983 ..... 39a

TABLE OF CITED AUTHORITIES

Page

Cases

Beardsley v. Webb,
30 F.3d 524 (4th Cir. 1994) 20

Berry v. Dep't of Soc. Servs.,
447 F.3d 642 (9th Cir. 2006) 18

Berry v. Stevinson Chevrolet,
74 F.3d 980 (10th Cir. 1996) 10

Bradon v. Abbott,
524 U.S. 624 (1998) 16

Brodheim v. Cry,
584 F.3d 1262 (9th Cir. 2009) 18

Burkybile v. Board of Ed. of the Hastings-on-Hudson Union Free Sch. Dist.,
411 F.3d 306 (2d Cir. 2005) 20

Burlington Industries, Inc. v. Ellerth,
542 U.S. 742 (1998) 10, 11

Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006) ..... *passim*

Coszalter v. City of Salem,
320 F.3d 968 (9th Cir. 2003) 19, 20, 22

Cited Authorities

Page

Crawford v. Metropolitan Government of Nashville and Davidson County Tennessee, 552 U.S. ___, 129 S.Ct. 846 (2009) 7, 9, 16

Davis v. McKinney, 518 F.3d 304 (5th Cir. 2008) 14

Faragher v. Boca Raton, 524 U.S. 775 (1998) 14

Federal Express Corp. v. Holowecki, 442 U.S. 389 (2008) 16

Gomez v. Vernon, 255 F.3d 1118 (9th Cir. 2001) 19

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) ..... *passim*

Jackson v. Birmingham Bd. of Education, 544 U.S. 167 (2005) 9

Jensen v. Potter, 435 F.3d 444 (3d Cir. 2006) 20

McKnight v. General Motors Corp., 908 F.2d 104 (7th Cir. 1990) 17

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) 12, 16

Cited Authorities

	Page
Moore v. California Institute of Technology Jet Propulsion Laboratory, 275 F.3d 878 (9th Cir. 2002)	18
Noviello v. City of Boston, 398 F.3d 76 (1st Cir. 2005)	20, 21
Nunez v. City of Los Angeles, 147 F.3d 867 (9th Cir. 1998)	21
Pennsylvania State Police v. Suders, 542 U.S. 129 (2004)	10, 14
Pickering v. Board of Educ., 391 U.S. 563 (1968)	8
Poland v. Chertoff, 494 F.3d 1174 (9th Cir. 2007)	18, 19
Rankin v. McPherson, 483 U.S. 378 (1987)	8
Robinson v. Shell Oil Co., 519 U.S. 337 (1997)	10
Schnidrig v. Columbia Mach., Inc., 80 F.3d 1406 (9th Cir. 1996)	20
Schwapp v. Town of Avon, 118 F.3d 106 (2d Cir. 1997)	21

Cited Authorities

Page

Spector v. Board of Trustees of Community Tech Colleges, 2009 WL 693353 (2d Cir. 2009) 18-19

Suders v. Easton, 725 F.3d 432 (3d Cir. 2003) 10

Velikonja v. Gonzales, 466 F.3d 122 (D.C. Cir. 2006) 20

Constitutional and Statutory Provisions

United States Constitution, First Amendment ..... *passim*

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 2

28 U.S.C. § 1343(4) 2

29 U.S.C. § 623(d) 17

42 U.S.C. § 2000e-3 ..... 1, 2, 7

42 U.S.C. § 1983 ..... 1, 2

Page

Other Authorities

Brake, Retaliation, 90 Minn. L. Rev. 18 (2005) 7

29 C.F.R. Part 1614 (2009) 15

EEOC Compliance Manual Part D 15

Rule 32.1, Federal Rules of Appellate Procedure 16

DECISIONS BELOW

The decision and order denying rehearing of the court of appeals are unreported and are included as Appendices A and E. The decision of the district court is unreported and is included as Appendix B. The decisions of the Equal Employment Opportunity Commission are unreported and are included as Appendices C and D.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The Court of Appeals issued its decision on December 23, 2009, and denied rehearing on February 10, 2010. It had jurisdiction based on 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The full text of 42 U.S.C. § 2000e-3 and 42 U.S.C. § 1983 are included as Appendices F and G.

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This petition seeks review of a decision of the court of appeals holding that, as a matter of law, repeated threats of job termination and criminal prosecution do not constitute retaliation actionable under either a Title VII employment discrimination claim or a Section 1983 action based on violation of the First Amendment.

Petitioner Luz Hellman filed complaints with the Equal Employment Opportunity Commission against her employer, the State of Arizona, alleging retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. When her claim was denied, she exercised her right to sue. She also asserted a claim against one of her superiors, the Chief Judge of the Arizona Court of Appeals, Sheldon Weisberg, alleging retaliation in violation of the First Amendment, asserted under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Her action was filed in the United States District Court, District of Arizona, which had jurisdiction based on 28 U.S.C. § 1331 and 1343(4).

The district court rendered its order of summary judgment against Mrs. Hellman on November 29, 2007. The clerk of the district court entered a final judgment reflecting the district court's summary judgment on November 29, 2007. Mrs. Hellman filed a timely notice of appeal from the district court's judgment on January 2, 2008.

Mrs. Hellman produced evidence that the defendants retaliated against her for assisting the religious discrimination in employment claim of a co-

employee, Regina Pangerl, by providing to Mrs. Pangerl documents that evidenced an attempted cover-up of the discriminatory acts against Pangerl by the defendants.

Mrs. Pangerl was a law clerk for Susan Ehrlich, another judge of the Arizona Court of Appeals. Pangerl complained to the court, to the Arizona Commission on Judicial Conduct, and to the Equal Employment Opportunity Commission that Judge Ehrlich had discriminated in the conditions of Mrs. Pangerl's employment based on her membership in the Church of Jesus Christ of Latter Day Saints.

The Vice Chief Judge found Mrs. Pangerl's complaint to be "credible." The Clerk of the court assessed it as "very credible." The Executive Director and the investigator for the Commission also believed the complaint. Indeed, the Commission later sustained Mrs. Pangerl's complaint and reprimanded Judge Ehrlich for her conduct. The defendant State of Arizona later settled Mrs. Pangerl's Title VII action against it.

Defendant Weisberg stood alone in his disbelief of Mrs. Pangerl. He sent a memorandum to the court's other judges denouncing the complaint against Judge Ehrlich as false. Although he had heard Mrs. Pangerl's verbal complaint in the very same meeting as the Vice Chief Judge and the Clerk, his memorandum did not mention their belief that Mrs. Pangerl had been truthful. Prior to sending his memorandum, he had conducted no investigation, not even speaking to the accused judge. Yet he told the other judges of the court he deemed the complaint unworthy of belief. This memorandum sparked a response by another judge

objecting to the inaccuracies in Weisberg's memo. At Mrs. Pangerl's request, Mrs. Hellman provided copies of the memoranda to Mrs. Pangerl for her use in her EEOC proceeding.

When Weisberg learned that Mrs. Hellman had provided documents to Mrs. Pangerl, he began a campaign of retaliation.[1] The defendants' acts included telling her that the defendants intended to refer her for criminal prosecution for the very action protected by Title VII.[2]

She was also told that defendant Weisberg had demanded that her immediate supervisor, Judge Donn Kessler, terminate her employment. She was also told that defendant Weisberg had said to Judge Kessler, "If you don't terminate her, I will." She was then told that Weisberg intended to persuade other judges on the court to terminate her, which he then attempted to do. For months, Mrs. Hellman "lived in fear that at any moment I would be terminated."

Mrs. Hellman's supervisor also repeatedly verbally reprimanded her and told her that she would be fired if she repeated her behavior. Yet he had informed the Commission on Judicial Conduct that he thought her conduct was probably protected by federal law.

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1. Most of the facts recited here are found in Mrs. Hellman's affidavit filed in the district court, but were also supported by other evidence, including documentary evidence and the depositions of the persons named in this statement of the case.

2. The protected character of her conduct was not decided by the Ninth Circuit and is therefore not at issue here.

Mrs. Hellman also suffered intense and ongoing workplace hostility. Fellow employees shunned her, literally turning their backs to her. They refused to cooperate with her in their work. She was excluded from virtually every social event in the workplace. These were not spontaneous responses, but were instigated by defendant Weisberg's communications to others stating or implying that she had committed serious wrongdoing. Weisberg also refused to do anything about the hostile environment – despite repeated requests by Mrs. Hellman that the employer act to remedy it.

Eventually, the employer's campaign cost Mrs. Hellman her health and her job. According to two expert medical witnesses (specialists in internal medicine and gastroenterology), the employer's ongoing retaliation over many months caused such stress that Mrs. Hellman suffered significant and ongoing physical illness. Her symptoms included vomiting and embarrassingly uncontrollable diarrhea.

The illness at times rendered Mrs. Hellman unable to perform her job duties. The stress induced her to make uncharacteristic mistakes in her work and necessitated more time to perform her duties. She was forced to exhaust sick leave. When the months of unrelenting harassment and illness became too much to bear, she was forced her to quit her job.

REASONS FOR GRANTING THE PETITION

I. TITLE VII WILL FAIL TO PROTECT EMPLOYEES IF EMPLOYERS ARE ALLOWED TO RETALIATE BY THREATS.

A. THREATS CONSTITUTE ADVERSE EMPLOYMENT ACTION.

A reasonable worker might well be dissuaded from supporting a Title VII discrimination claim by her employer's repeated threats to terminate her employment and refer her for criminal prosecution.

The Court of Appeals, contrary to the standard for adverse employment action established by *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), erroneously held that such threats are never actionable. The court held: "[T]he fact that Judge Weisberg wanted to fire her and have her criminally prosecuted is insufficient to support her Title VII claims. It is undisputed that Mrs. Hellman was never fired or prosecuted, and the mere threat of termination does not constitute an adverse employment action." Decision at 4-5.

The *Burlington Northern v. White* standard is whether the retaliation "might well" dissuade a "reasonable worker" from supporting a discrimination charge. 548 U.S. at 68. No longer are ultimate adverse employment actions such as termination required. *Id.* at 67. "The anti-retaliation provision [of Title VII] . . . is not limited to discriminatory actions that affect the terms and conditions of employment." *Id.* at 64.

The Ninth Circuit infringed the *White* standard in two ways. First, it incorrectly held that job termination is required. Second, it failed to recognize that threats can be the kind of action that deters employees from participating in a discrimination investigation or proceeding.

The anti-retaliation provision of Title VII is broad enough to encompass threats. It is broader than the protection against employment discrimination itself. *White*, 548 U.S. at 62-67. The statute provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of [its] employees . . . because [the employee] has . . . assisted or participated in any manner in an investigation, proceeding or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). Under this standard, even a change in work schedule or exclusion from training can suffice. *White*, 548 U.S. at 69, 79. Threats of job termination and false criminal prosecution are much more severe and fall well within the ambit of the statute.

Indeed it is employees' *fear* of retaliation, not the retaliation itself, that undercuts the statutory policy of protecting cooperation with discrimination claims and proceedings. *See Crawford v. Metropolitan Government of Nashville and Davidson County Tennessee*, 129 S.Ct. 846, 852 (2009) ("[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.") (citing Brake, Retaliation, 90 Minn. L. Rev. 18, 20 (2005)). Similarly,

threats of termination that chill protected expression support liability. " '[T]he threat of dismissal from public employment is . . . a potent means of inhibiting speech.' " *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968)).

The Ninth Circuit's decision that no reasonable worker would be deterred by repeated threats of termination and a threat of prosecution is untenable. It is contradicted by human experience. What reasonable worker would simply shrug off months of fear that she would be fired at any moment? Who would proceed to support a retaliation claim undeterred by the employer's statement that it intended to prosecute her for supposed criminal conduct? If "common sense" instructs that such acts as reassignment to more arduous duties can constitute actionable retaliation, *White*, 548 U.S. at 70, then common sense also teaches that threatening job termination and criminal prosecution can constitute retaliation.

But it is not solely for plaintiff's benefit that the statute extends its protection. The statute protects each participant in a discrimination claim not only for their own sake, but to prevent coworkers from being discouraged from participating in that claim – or any future discrimination case.

This Court's decisions reflect its consistent concern that other workers not fear participation in Title VII matters. "If it were clear law that an employee. . . could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses

against themselves or against others." *Crawford*, 129 S.Ct. at 852. "If [employers] were permitted to retaliate freely, individuals who witness discrimination would be loath to report it, and all manner of violations might go unremedied as a result." *Jackson v. Birmingham Bd. Of Education*, 544 U.S. 167, 180 (2005). "Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends." *White*, 548 U.S. at 67.

If the Ninth Circuit's decision is allowed to stand, it would authorize employers to retaliate quite effectively through threats. Such threats can quell any inclination to participate.

What reasonable worker would participate in any discrimination charge after witnessing the first person who participated in a discrimination proceeding be subjected to threats of termination, the threat of criminal prosecution, and intense workplace hostility? Few workers would choose to call the employer's bluff at the risk of losing their livelihood. "A reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former." *White*, 548 U.S. at 73.

Indeed, continuing harassment can be *more* severe than job termination itself. An employer can do little more to an employee who has already been terminated. But an employee who is retained can be kept under the employer's thumb and subjected to repeated, continuing threats and other harassment.

The court below so narrowly construed Title VII's anti-retaliation provision that it would "fail to fully achieve the anti-retaliation provision's 'primary purpose,' namely, 'maintaining unfettered access to statutory remedial mechanisms.'" *White*, 548 U.S. at 63–64 (2006) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)). The court of appeals sanctioned the very sorts of acts that would chill typical workers from Title VII participation. It provided employers with a lawful way to effectively retaliate.

This Court has never squarely held that such threats constitute actionable adverse employment action. However, the Court has recognized that the kinds of actions threatened here – termination and prosecution – are unlawful retaliation. *See, e.g.*, *White*, 548 U.S. at 63-64 (citing *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996) and noting that actionable conduct was found when employer had filed false criminal charges against employee). *See also Suders v. Easton*, 725 F.3d 432, 439 (3d Cir. 2003), *vacated sub nom. Pennsylvania v. Suders*, 542 U.S. 129 (2004) (false criminal accusation was part of retaliation).

Moreover, the Court has accepted at least for the purpose of argument that threats can constitute primary Title VII sex, race or religious discrimination. *Burlington Industries, Inc. v. Ellerth*, 542 U.S. 742, 754 (1998) (noting that case involved threats of job termination and threats to alter conditions of employment and accepting for purposes of review that a trier of fact could find this sufficiently "severe or pervasive" to constitute a hostile work environment). Now that a lower court has granted employers *carte*

blanche to threaten, this Court should intervene to clarify that juries are to decide whether such threats are prohibited retaliation.

B. THREATS COUNT AS PART OF A HOSTILE WORK ENVIRONMENT.

Even if threats were not sufficiently adverse actions in themselves, they are indicia of a hostile work environment. The Ninth Circuit mistakenly excluded the threats when it considered whether a hostile work environment existed. Instead, the court considered only what it dismissively – and inaccurately – labeled as mere "snubbing" by co-workers. Decision at 4.

Threats can be part of a hostile work environment. Less specific, less severe threats were part of the basis the jury's verdict against the employer in *Ellerth*. The supervisor's statement that he "could make [plaintiff's] life very hard or very easy" at work, 542 U.S. at 748, was part of the "severe or pervasive conduct" that created a hostile work environment. *Id.* at 754.

The court of appeals also considered each incident of retaliation separately, rejecting each as alone insufficient to be actionable. See Decision at 3 ("None of the actions Hellman identifies rises to [the required] level of severity."). One by one, the panel listed the employer's retaliatory acts and then declared each separate act to be insufficient. See Decision at 4 ("snubbing"), *id.* at 4-5 (threats to terminate), *id.* at 5 (reprimand).

Such piecemeal analysis runs afoul of this Court's decisions. Courts are not to consider retaliatory incidents seriatim, weighing them in isolation and rejecting them one-by-one. Instead, this Court's decisions bound the Ninth Circuit to consider all of the facts and circumstances together. The facts include not just the acts of coworkers, but the acts of the employer's supervisors. They include not just ostracism, but all retaliatory hostile actions.

In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), for example, this Court held that a work environment can be actionable under Title VII if it is so "severe or pervasive" as to "alter the conditions of [the victim's] employment and create an abusive working environment." *Id.* at 21 (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, 67 (1986)). "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." 510 U.S. at 23. Under *Harris*, *all* of the employer's acts, together with the context of the circumstances in which those acts are committed, must be considered in deciding whether a hostile environment existed.

In *White*, this Court struck the same note when it declared that "the significance of any given act of retaliation will often depend on the circumstances. Context matters." 548 U.S. at 69.

Mrs. Hellman was victimized by the threat of prosecution, threats of termination, reprimands, workplace ostracism, and coworkers' refusal to cooperate in her work. These acts made her work more difficult and resulted in stress-induced illness that

rendered her at times unable to work at all. These events continued unabated for many months.

All of these facts and circumstances should be considered in their totality. *See Harris*, 510 U.S. at 23 (listing as examples of relevant facts the frequency of the conduct, severity of the conduct, whether it is humiliating, whether it unreasonably interferes with work performance, and the effect on the employee's well-being). When so considered, it is apparent that a jury could find them to have created a hostile work environment. *Cf. White*, 548 U.S. at 69 (jury finding of retaliation was sufficiently supported by evidence).

Instead of allowing a jury to consider all of the facts together, however, the Ninth Circuit treated them as legal questions. Even then, it dealt with the facts individually rather than as a totality. Only coworker social "snubbing" was considered as part of the hostile work environment. The threats of prosecution and termination, the refusal of coworkers to cooperate, the long duration of harassment and the effects on Mrs. Hellman's work performance and health simply did not count.

This was a fatal error.[3] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the

3. The error was not only a legal one, as discussed in the text, but a factual one. As mentioned in Petitioner's Statement of the Case, co-workers did more than "snub" her: They refused to cooperate with her. And she was reprimanded more than once, not the single time acknowledged by the court of appeals. See Decision at 5.

frequency of the discriminatory conduct; its severity; . . . and whether it unreasonably interferes with an employee's work performance. . . [N]o single factor is required." *Harris*, 510 U.S. at 23. *Accord*, *Farragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998). In deciding whether retaliation occurred, "context matters." *White*, 548 U.S. at 69.

The decision below also overlooked crucial evidence that Mrs. Hellman was forced to quit by the harassment. *Pennsylvania v. Suders* held that supervisor harassment leading to constructive discharge can support employer liability. An allegation of constructive discharge negates any assertion that an unexecuted threat of termination is insufficient. *Davis v. McKinney*, 518 F.3d 304, 317 (5th Cir. 2008) (First Amendment case). For this reason, the decision below was incorrect.

However, constructive discharge is not required to render a threat of termination actionable. Whether the employee is courageous enough – or foolish enough – to cling to her position in the face of harassment, an employer's unfulfilled threats of false criminal prosecution and of the unlawful act of retaliatory job termination is likely to intimidate reasonable workers and therefore can be adverse employment actions.

C. IF ALLOWED TO STAND, THE DECISION WILL SEVERELY UNDERCUT TITLE VII PROTECTION.

Allowing the court of appeals decision to stand would seriously harm the statute's protection. If threats might well discourage participation in discrimination matters, then allowing threats subverts the statutory purpose.

The Equal Opportunity Employment Commission believes it has the power to protect employees from threats. It recognizes that the statute protects employees from such threats. It counts them among the actions of retaliation prohibited by Title VII:

> The most obvious types of retaliation are denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge. *Other types of adverse actions include threats*, reprimands, negative evaluations, harassment, or other adverse treatment.

EEOC Compliance Manual Part D, available at *http://www.eeoc.gov/policy/docs/retal.html#IIPartD* (last visited April 21, 2010).[4]

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4. *See also* 29 C.F.R. Part 1614, available at *http://edocket.access.gpo.gov/2009/pdf/E9-30162.pdf* (last accessed April 21, 2010) "Where the threatened act or acts, if implemented, would be sufficiently severe in the context of the complainant's employment to result in a materially adverse consequence to the employee, the threats may meet this [hostile work environment] standard."

The EEOC Compliance Manual is persuasive in determining the statute's protection. *E.g.*, *Crawford*, 129 S.Ct. at 851, citing *Federal Express Corp. v. Holowecki*, 442 U.S. 389 (2008) (in turn quoting *Bradon v. Abbott*, 524 U.S. 624, 642 (1998)). The EEOC's interpretation and practice is especially persuasive in this instance because the EEOC's interpretation of the statute to protect against threats is a longstanding one. *Cf. Meritor*, 477 U.S. at 70 (quoting amicus curiae brief of EEOC that employees are protected against threats).

The Court of Appeals held, however, that unfulfilled threats are *never* adverse employment actions and *never* chill protected speech. It further omitted threats from consideration whether the work environment was hostile.

The court thereby sanctioned any and all threats by employers to discourage workers from Title VII participation and First Amendment expression. If allowed to stand, this will severely narrow the congressionally intended protection of Title VII.[5]

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5. Although the decision was unpublished, Federal Rule of Procedure 32.1(a) provides that such decisions may be freely cited in future cases.

> Rule 32.1. Citing Judicial Dispositions
>
> (a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:
>
> (i) designated as "unpublished," "not for publication," "non-precedential," "not

(Cont'd)

"Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends." *White*, 548 U.S. at 67.

Threats are commonplace means of retaliation. "Retaliation or a threat to retaliate is a common method of deterrence . . ." *McKnight v. General Motors Corp.*, 908 F.2d 104, 111 (7th Cir. 1990). Employees will be threatened with greater frequency if the decision is allowed to stand. Employers will soon enough realize that they can threaten with impunity and avail themselves of a lawful means of discouraging employees' participation.

Not only would this decision send precisely the wrong signal to employers in Title VII cases, it might be considered an invitation to retaliate by threats in other contexts. Similar anti-retaliation provisions exist in other statutes, such as the the Age Discrimination in Employment Act. 29 U.S.C. § 623(d).

(Cont'd)

> precedent," or the like; and issued on or after January 1, 2007.

Petitioner also notes that other opinions of this Court on similar Title VII issues have reviewed unpublished decision of the courts of appeals. *E.g.*, *Harris v. Forklift*, *supra*. Finally, issuance of the decision as unpublished adds to the concern discussed in Part II of this petition.

II. THE DECISION BELOW CONFLICTS WITH THE NINTH CIRCUIT'S OWN DECISIONS AND THOSE OF OTHER CIRCUITS.

Other circuits recognize – indeed, the Ninth Circuit itself recognizes in other cases – that facts such as those presented here justify a jury trial. By holding the facts insufficient as a matter of law and preventing the case from reaching the jury, the Ninth Circuit strayed from the path taken by most courts.

This is true on the pivotal issue whether a threat is actionable. "[T]he mere threat of harm can be an adverse action," the Ninth Circuit wrote elsewhere, "regardless of whether it is carried out because the threat itself can have a chilling effect." *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009), citing *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 655 (9th Cir. 2006) (noting implicit threat of adverse action sufficient to establish Title VII prima facie case). Even implicit threats have been held to be actionable. *Poland v. Chertoff*, 494 F.3d 1174, 1180 (9th Cir. 2007) (administrative inquiry of employee was adverse employment action). *See also Moore v. California Institute of Technology Jet Propulsion Laboratory*, 275 F.3d 878 (9th Cir. 2002) (threats of adverse action held to be actionable retaliation under analogous statute). These cases take polar positions to the holding here that no matter how drastic the action threatened, threats are never actionable.

On the other hand, a few courts have said threats are not enough. *E.g.*, *Spector v. Board of Trustees of Community Tech Colleges*, 2009 WL 693353, 2 (2d Cir.

2009) (district court did not err in holding that pattern of alleged harassment consisting of, *inter alia*, unfulfilled threats of disciplinary action, rumors, accusations of misconduct, and notices "reminding" plaintiff of the availability of mental health counseling did not rise to level of materially adverse actions).

In other cases, the Ninth Circuit defined the scope of actionable conduct much more broadly. "An adverse employment action is '*any* adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.'" *Poland v. Chertoff*, 494 F.3d at 1180 (emphasis added; citation omitted). "[A] retaliation claim may assert an injury no more tangible than a chilling effect on First Amendment rights." *Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir. 2001).

In yet another case, the Ninth Circuit held that acts very much like those committed against Mrs. Hellman are actionable in First Amendment retaliation cases. Applying a "reasonably likely to deter test" similar to the *White* standard for Title VII, the court held First Amendment retaliation includes many acts similar to those against Mrs. Hellman: an unwarranted assignment of blame; a reprimand containing a false accusation; a criminal investigation; repeated and ongoing verbal harassment and humiliation; a threat of disciplinary action. *Coszalter v. City of Salem*, 320 F.3d 968, 976 (9th Cir. 2003). Indeed, *Coszalter* held that it was error to do exactly what the panel did in Mrs. Hellman's case: fail to consider the enumerated acts as adverse employment action. Instead of affirming summary summary judgment against the employee, as

the court did with Mrs. Hellman, the court reached the opposite result and reversed summary judgment. *Id.* at 977.

Other circuits agree that threats – even threats less direct and less severe than those made against Mrs. Hellman – can be actionable. *E.g.*, *Burkybile v. Board of Ed. of the Hastings-on-Hudson Union Free Sch. Dist.*, 411 F.3d 306, 313-314 (2d Cir. 2005) (threat of a hearing that might result in termination or suspension was sufficiently adverse employment action in First Amendment case); *Velikonja v. Gonzales*, 466 F.3d 122 (D.C. Cir. 2006) (employer's disciplinary investigation, without further concrete action, constituted actionable retaliation).

Other decisions also reject the proposition that the evidence is not to be heard by a jury. Instead, they hold that these questions are by nature factual, and for juries to resolve. For example, whether constructive discharge occurred "is normally a factual question for the jury." *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1411 (9th Cir.1996). Whether all the facts and circumstances show a hostile environment is a question for the trier of fact, not for the court. *Noviello v. City of Boston*, 398 F.3d 76, 94 (1st Cir. 2005). *See also Jensen v. Potter*, 435 F.3d 444, 454 (3d Cir. 2006) (Alito, J.) (the issue of hostile environment "should not have been rejected at the summary judgment stage"). *Accord*, *Beardsley v. Webb*, 30 F.3d 524, 530 (4th Cir. 1994) (whether or not "harassment was sufficiently severe or pervasive is quintessentially a question of fact").

The decision below departs from the view of other circuits in yet another way. The failure to consider the totality of all facts and circumstances in assessing hostile work environment, as the Ninth Circuit did, has elsewhere been held to be reversible error under *Harris v. Forklift*, *supra*. *Schwapp v. Town of Avon*, 118 F.3d 106 (2d Cir. 1997). Nor should the court have so readily rejected coworker hostility: "Harassment by coworkers as a punishment for undertaking protected activity is a paradigmatic example of adverse treatment spurred by retaliatory motives and, as such, is likely to deter the complaining party (or others) from engaging in protected activity." *Noviello*, 398 F.3d at 90.

The decision below cited and relied heavily on *Nunez v. City of Los Angeles*, 147 F.3d 867 (9th Cir. 1998). See Decision at 6. It characterized *Nunez* as having rejected similar contentions in the First Amendment retaliation context. *Id.*

But the Ninth Circuit itself elsewhere said *Nunez* does not so hold:

> [W]e cannot read *Nunez* as holding that the government is allowed to take severe retaliatory actions - such as instigating unwarranted criminal investigations or disciplinary actions, or engaging in campaigns of harassment and humiliation. The essential holding of *Nunez* is simply that when an employer's response includes only minor acts, such as "bad-mouthing," that cannot reasonably be expected to deter protected

> speech, such acts do not violate an employee's First Amendment rights.

Coszalter, 320 F.3d at 975-76.

The Ninth Circuit declined to set its own house in order by granting rehearing en banc to resolve any conflict among its own decisions. It is unworkable to have such divergent views of retaliation within the same circuit, leaving litigants to guess as to what the law might be.

The court of appeals has also created conflict with other circuits that have spoken on these issues. They have held that threats are cognizable retaliation, that whether retaliation occurred is a jury question, and that the totality of facts and circumstances must be considered together.

Finally, the decision of the court of appeals could not have been decided in a more unfortunate context. This case involves a defendant judge and his court. The decision so dramatically departs from not only this Court's opinions on the subject, and not only those of other circuits, but of the Ninth Circuit itself, that the decision is unseemly.

The effect of the decision is to protect judicial defendants in circumstances that subject other employers to liability. The public might well view this cynically, as a special rule for fellow judges. The decision of the court of appeals is strikingly more parsimonious toward this plaintiff than the court has been to others. A rule of law created by judges that appears to afford special advantages to judges risks disrespect of the judiciary. The context of this case further justifies review. Alternatively, it warrants the exercise of the Court's supervisory power to reverse and remand.

This Court should act to make uniform the law of Title VII and the First Amendment. Are employers free to threaten their employees with unlawful termination and criminal prosecution to deter them from free expression and participation in a discrimination charge? Petitioner respectfully submits that the answer is "No."

CONCLUSION

Petitioner requests that this Court issue its writ of certiorari to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 23, 2009

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 08-15059

LUZ HELLMAN,

Plaintiff - Appellant,

v.

SHELDON WEISBERG; STATE OF ARIZONA,

Defendants - Appellees.

Appeal from the United States District Court
for the District of Arizona
Frederick J. Martone, District Judge, Presiding

Argued and Submitted December 8, 2009
San Francisco, California

Before: TASHIMA, GRABER, and BYBEE, Circuit Judges.

Appendix A

MEMORANDUM*

Plaintiff Luz Hellman, a former judicial assistant at the Arizona Court of Appeals, appeals the district court's order granting summary judgment to defendants Sheldon Weisberg, former Chief Judge of the Arizona Court of Appeals, and the State of Arizona. Hellman claims that she was retaliated against for participating in the investigation of a discrimination claim made by a former law clerk at the Arizona Court of Appeals. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

As a preliminary matter, we hold that Hellman's notice of appeal was timely. The district court clerk's office was closed on the day her notice of appeal was originally due. Thus, the office was "inaccessible" within the meaning of Federal Rule of Appellate Procedure 26(a)(3). *See Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 747 (9th Cir. 2001). The availability of electronic filing does not change this result. The inaccessibility clause, as it existed when Hellman's notice of appeal was filed, was added to Rule 26 in 1989, long before the advent of electronic filing. *See* Fed. R. App. P. 26, cmt. (1989). The clause was therefore not intended to distinguish between filings in electronic and physical form. Congress has acknowledged as much, recently updating the rule to address more clearly the existence of electronic filing. *See* Fed. R. App. P. 26, cmt. (Dec. 1, 2009). Accordingly, Hellman's notice of appeal,

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

filed January 2, 2008, was timely, and we may exercise jurisdiction over this case.

We review *de novo* a district court's order granting summary judgment. *Universal Health Servs. Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004). We must determine, viewing the evidence in the light most favorable to Hellman, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).

To establish her claim of retaliation under Title VII, Hellman was required to prove that "(1) [she] engaged in a protected activity, (2) she suffered an adverse employment action, and (3) there was a causal link between the protected activity and the adverse employment action." *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1093-94 (9th Cir. 2008). We need not decide whether Hellman engaged in protected activity in this case, because we agree with the district court that Hellman did not establish that she suffered an adverse employment action.

Under *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006), an action constitutes an adverse employment action only if it is "materially adverse," meaning that it would "dissuade[] a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (internal quotation marks omitted). As the Court has

often stated, Title VII "does not set forth a general civility code for the American workplace." *Id.* (internal quotation marks omitted). Thus, not every disagreeable workplace action constitutes retaliation; rather, retaliation must produce "an injury or harm." *Id.* at 67. None of the actions Hellman identifies rises to this level of severity.

Hellman's major complaint concerns the snubbing she received from fellow coworkers. This court has previously held that ostracism by coworkers does not constitute an adverse employment action, at least where it does not have an effect on the employee's ability to perform her job. *Brooks v. City of San Mateo*, 229 F.3d 917, 929 (9th Cir. 2000) ("[O]stracism suffered at the hands of coworkers cannot constitute an adverse employment action."); *Manatt v. Bank of Am., NA*, 339 F.3d 792, 803 (9th Cir. 2003); *cf. Davis*, 520 F.3d at 1090 (holding that ostracism constituted an adverse employment action where employee's ban from "an important area of the workplace" contributed to a material change in the terms and conditions of her employment). The ostracism Hellman suffered was mostly social in nature; aside from the effects of the snubbing on her enjoyment of her work environment, there is no evidence that the snubbing went so far as to interfere with her job responsibilities. Accordingly, any ostracism Hellman experienced did not rise to the level of an adverse employment action. *See Burlington*, 548 U.S. at 68 (citing with approval assertion that "snubbing by supervisors and co-workers [is] not actionable under § 704(a)" (internal quotation marks omitted)).

Similarly, the fact that Hellman was informed that Judge Weisberg wanted to fire her and have her criminally prosecuted is insufficient to support her Title VII claims. It is undisputed that Hellman was never fired or prosecuted, and the mere threat of termination does not constitute an adverse employment action. *See Hardage v. CBS Broad. Inc.*, 427 F.3d 1177, 1189 (9th Cir. 2005), *amended by* 433 F.3d 672 (2006), *and* 436 F.3d 1050 (2006) (finding that "snide remarks" about harassment claim and thinly veiled threats were not enough to constitute retaliation).

Finally, the reprimand Hellman received from her boss, Judge Kessler, also did not constitute an adverse employment action. The one-time verbal reprimand had no effect on her job duties and was not placed in her personnel file. Especially given Judge Kessler's otherwise supportive attitude, his reprimand did not rise to the level of adverse employment action.

Hellman's First Amendment claim against the State of Arizona fails for similar reasons. To establish her First Amendment claim, Hellman was required to show that: "1) [she] engaged in constitutionally protected speech; 2) [her] employer took 'adverse employment action' against [her]; and 3) [her] speech was a 'substantial or motivating' factor for the adverse action." *Marable v. Nitchman*, 511 F.3d 924, 929 (9th Cir. 2007).

As above, we conclude that Hellman did not suffer an "adverse employment action" sufficient to support her claim that her First Amendment rights were

violated. To begin with, the test of adverse employment action in the First Amendment context is substantially similar to the test under Title VII. *See Coszalter v. City of Salem*, 320 F.3d 968, 975-76 (9th Cir. 2003) (holding that the allegedly retaliatory action must "deter the exercise of First Amendment rights"). Further, the purportedly retaliatory actions Hellman experienced — social ostracism, threat of termination, and a reprimand from Judge Kessler — are similar to those that we deemed insufficient to support a First Amendment retaliation claim in *Nunez v. City of Los Angeles*, 147 F.3d 867 (9th Cir. 1998). *See Coszalter*, 320 F.3d at 976 ("The essential holding of *Nunez* is simply that when an employer's response includes only minor acts, such as 'bad-mouthing,' that cannot reasonably be expected to deter protected speech, such acts do not violate an employee's First Amendment rights.").

The district court did not err in granting summary judgment to defendants. The judgment of the district court is therefore **AFFIRMED.**

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA FILED NOVEMBER 29, 2007

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. CV-06-1465-PHX-FJM

Luz Hellman,

Plaintiff,

vs.

Sheldon Weisberg, and the State of Arizona,

Defendants.

ORDER

This is an action by Luz Hellman against Judge Sheldon Weisberg pursuant to 42 U.S.C. § 1983, alleging violation of her First Amendment rights, and against the State of Arizona under Title VII, 42 U.S.C. § 2000e, and the Arizona Civil Rights Act, A.R.S. §§ 41-1461-67, alleging retaliation.[1]

The court has before it the State of Arizona's motion for summary judgment (doc. 54), plaintiff's response and

1. In interpreting the Arizona Civil Rights Act, Arizona follows Title VII. See *Higdon v. Evergreen Int'l Airlines, Inc.*, 138 Ariz. 163, 165 n.3, 673 P.2d 907, 909 n.3 (1983). Therefore, we consider these claims together.

cross-motion for summary judgment (doc. 111), the State's response (doc. 134) and reply (doc. 121), and plaintiff's reply (doc. 147). We also have before us defendant Weisberg's motion for summary judgment (doc. 55), plaintiff's response and cross-motion for summary judgment (doc. 77), Weisberg's response (doc. 139) and reply (doc. 138), and plaintiff's reply (doc. 146). We also have defendants' motion to dismiss the emotional damages claim (doc. 87), defendants' motion to strike (doc. 130), two unopposed motions by defendants to supplement their motion to dismiss (docs. 128, 143), and defendants' unopposed motion for leave to file supplemental authority in support of their motion for summary judgment (doc. 148).

I

Hellman worked at the Arizona Court of Appeals as a judicial assistant to Judge Jefferson Lankford. She married him in 2001, and then resigned. In 2003, she rejoined the court to work as a judicial assistant to Judge Donn Kessler. She stated that she was "finally in a position to get some things changed around here," that she was going to "stir the pot," "do something about Judge [Susan] Ehrlich," and was "in the process of contacting Judge Ehrlich's former law clerks." DSOF ¶ 4.

In 2005, Hellman met Regina Pangerl, a law clerk for Judge Ehrlich. Pangerl told Hellman that Judge Ehrlich had made discriminatory comments about Pangerl's Mormon religion. Hellman took it upon herself

to contact Keith Stott, the Executive Director of the Arizona Commission on Judicial Conduct, to discuss the matter. She later accompanied Pangerl to meet with Stott so that Pangerl could file a complaint against Judge Ehrlich. Eventually, Pangerl transferred from Judge Ehrlich's chambers to Judge Weisberg's chambers for the remainder of her clerkship term. On November 4, 2005, Pangerl filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") against the State of Arizona, claiming religious discrimination and harassment by Judge Ehrlich.

On November 23, 2005, Judge Weisberg, then Chief Judge of the Arizona Court of Appeals, wrote a memorandum informing his judicial colleagues of Pangerl's EEOC claim. Judge Weisberg's memorandum was marked "CONFIDENTIAL" and provided, "[o]f course, it goes without saying, that this is a confidential matter." PSOF, exhibit D. He stated that "[b]ased upon the information and knowledge available to me, I do not believe any of Pangerl's allegations." *Id.* He asked the other judges to "contact [him] immediately if [they had] any information relevant to Pangerl's Charge of Discrimination." Id. The memorandum was delivered to each Court of Appeals judge in an envelope marked "confidential." On November 25, 2005, Judge Lankford wrote a memorandum in response to Judge Weisberg's, which he delivered in an envelope marked "confidential." On November 27, 2005, without obtaining permission from either judge, Hellman made copies of the Weisberg and Lankford memoranda and gave them to Pangerl.

The next day an Associated Press reporter contacted Judge Weisberg about the judges' memoranda, and later that day an Associated Press story revealed content from both memoranda.

After the memoranda were delivered to Pangerl and leaked to the press, Hellman arranged a meeting with Judges Weisberg, Kessler, and Gemmill to confess her role in the leak. She tape-recorded the meeting without the judges' knowledge or consent. She admitted that she understood that she was "gonna get the eye from a lot of people, and [was] okay with that." PSOF ¶ 15. She was insolent and rude to Judge Weisberg and called the Court of Appeals a "gutless court that has very little integrity." DSOF ¶ 17. She displayed a shockingly inappropriate understanding of her role at the court.

In response to her misappropriation and disclosure of the memoranda, Judge Weisberg informed the other judges that only Judge Kessler, her direct supervisor, had disciplinary power over her. Exercising remarkable restraint, Judge Kessler chose not to terminate her for her gross insubordination. Many employers would have escorted her out of the building. He did conclude that her release of the two court memoranda violated the Arizona Code of Conduct for Judicial Employees[2] and

2. Canon 3 of the Arizona Code of Conduct for Judicial Employees provides, "[a] judicial employee shall not disclose any confidential information received in the course of official duties, except as required in the performance of such duties, or use such information for personal gain or advantage." DSOF (Cont'd)

Rule 123, Rules of the Arizona Supreme Court,[3] both of which require employees and judges to maintain the confidentiality of court and personnel information. Judge Kessler informed Hellman that her disclosure of confidential court memoranda could be deemed theft under state law, DSOF ¶ 32, and stated that he would put a note in her personnel file regarding the incident.

Hellman claims that she suffered retaliation as a result of disclosing the memoranda. She claims that she was reprimanded, threatened with termination and criminal prosecution, and shunned by her co-workers. She complained to Judge Kessler about a hostile and retaliatory work environment. Judge Kessler in turn

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(Cont'd)

¶ 27, exhibit J. Compliance with the Code of Conduct is a condition of continued employment. PSOF ¶ 28.

The Federal Code of Conduct for Judicial Employees, Canon 3(D), imposes identical confidentiality obligations on federal judicial employees. ("A judicial employee should never disclose any confidential information received in the course of official duties except as required in the performance of such duties, nor should a judicial employee employ such information for personal gain.")

3. Under Rule 123, Rules of the Supreme Court of Arizona, a court employee is required to segregate documents containing confidential information from the public record and closes from inspection "records maintained concerning individuals who are employees," as well as "[a]ll notes, memoranda or drafts thereof prepared by a judge . . . and used in the course of deliberations on . . . administrative matters." Rule 123(c)(2)(A), (e)(1), (e)(8)(B), Rules of the Supreme Court of Arizona.

reported the complaints to Judge Weisberg. Hellman claims to have experienced gastrointestinal problems, stress, and other medical problems.

On January 5, 2006, Hellman filed a charge of discrimination with the EEOC claiming retaliation for engaging in protected activity, which she described as "providing two memorandums [sic] to an employee who had filed a charge of discrimination with the EEOC." PSOF, exhibit J. The Court of Appeals engaged an independent lawyer to investigate Hellman's allegations. That lawyer concluded that Hellman's retaliation allegations were unsubstantiated. DSOF ¶ 24. In late September 2006, Hellman resigned as a result of the "continued ostracization that she suffered." PSOF ¶ 138.

II

Hellman alleges that, in violation of Title VII, 42 U.S.C. § 2000e-3(a), the State of Arizona retaliated against her for disclosing the confidential memoranda. Title VII's anti-retaliation provision makes it unlawful for an employer to discriminate against any employee in retaliation for either (1) "oppos[ing] any practice made an unlawful practice by [Title VII]" ("opposition clause"); or (2) "participat[ing] in any manner in an investigation, proceeding, or hearing under this subchapter" ("participation clause"). *Id.* To establish a prima facie claim of retaliation under either clause, Hellman must show that (1) she engaged in a protected activity, (2) she suffered an adverse employment action, and (3) there was a causal link between the protected activity

and the adverse action. *Poland v. Chertoff*, 494 F.3d 1174, 1179-80 (9th Cir. 2007). The State argues that she neither engaged in protected activity under Title VII, nor suffered a cognizable adverse employment action. We agree.

A

In her January 5, 2006, EEOC charge of discrimination, Hellman asserted that she engaged in protected activity "by providing two memorandums [sic] to an employee who had filed a charge of discrimination with the EEOC." PSOF, exhibit J.[4] She contends that this activity is protected under the participation clause because she was assisting in establishing Pangerl's EEOC claim.

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4. Hellman now claims that she engaged in two other forms of protected activity, namely (1) making statements to the Arizona Commission on Judicial Conduct ("CJC") and (2) filing a charge of discrimination with the EEOC. Neither of Hellman's two EEOC charges identified "statements to the CJC" as protected activity. Because this claim has not been administratively exhausted, it is not properly before us.

While filing an EEOC charge is a protected activity, Hellman did not allege retaliation for filing an EEOC charge until her response to the State's motion for summary judgment. She did not seek leave to amend her complaint to assert this claim. Nonetheless, even if we agreed that Hellman's retaliation claim was properly premised upon her filing an EEOC charge, the outcome would be the same because she suffered no adverse employment action. *See infra* section IIB.

Appendix B

In order to determine whether an employee's conduct is "protected activity" under Title VII, we must balance "the purpose of the Act to protect persons engaging reasonably in activities opposing . . . discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel." *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763 (9th Cir. 1996) (analyzing a claim of protected activity under the ADEA) (quoting *Wrighten v. Metro. Hosps., Inc.*, 726 F.2d 1346, 1355 (9th Cir. 1984) (Title VII case)). An employee's activity is protected only if it is "reasonable in view of the employer's interest in maintaining a harmonious and efficient operation." *Id.* (quoting *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978)); *see also Jefferies v. Harris County Cmty. Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980) (activity must be "reasonable in light of the circumstances").

Activity in violation of employee rules of conduct is not "protected activity" under Title VII. For example, in *Laughlin v. Metro. Washington Airports Auth.*, 149 F.3d 253 (4th Cir. 1998), a case strikingly similar to ours, the court found that the unauthorized copying and release of confidential information to a co-worker in support of the co-worker's potential EEOC claim was not protected activity. The court "easily conclude[d] that the employer's interest in maintaining security and confidentiality of sensitive personnel documents outweighs Laughlin's interest in providing those documents to [the co-worker]." *Id.* at 260. The court reasoned that given the employer's "reasonable and

significant interest in preventing the dissemination of confidential personnel documents," the employer's decision to terminate Laughlin was "sound." *Id.*

Similarly, in Jefferies, the court held that the employee's unauthorized copying of confidential documents, even for the purpose of opposing employment discrimination, interfered with the employer's "legitimate and substantial interest in keeping its personnel records and agency documents confidential." 615 F.2d at 1036. Absent evidence that the documents would have been destroyed, or that the available grievance procedure was inadequate, the court concluded that disclosing the documents was not protected activity. *Id.*

In O'Day, the court rejected a claim of protection under the opposition clause of the Age Discrimination in Employment Act ("ADEA"). 79 F.3d at 763-64. Applying Title VII retaliation standards to the ADEA claim, the court held that an employee's conduct in stealing sensitive personnel documents was not protected activity even where the employee alleged he was preserving evidence for his future lawsuit against the company. In balancing an employer's interest in "maintaining a harmonious and efficient workplace" with the protection afforded by the anti-discrimination laws, the court stated, "we are loathe to provide employees an incentive to rifle through confidential files looking for evidence that might come in handy in later litigation. The opposition clause . . . is not a license to flaunt company rules or an invitation to dishonest behavior." *Id.*

Appendix B

Without citation to any authority, Hellman suggests that opposition clause cases are distinguishable from her claim brought under the participation clause. She urges a sweeping interpretation of the protection available under the participation clause, noting that Congress chose to protect employees who "participate[ ] in *any* manner" in an EEOC investigation. 42 U.S.C. § 2000e-3(a) (emphasis added). We reject the strained suggestion that the language "participate in any manner" was intended to protect all conduct associated with an EEOC proceeding, including conduct that violates an employee's duty of confidentiality and honesty. "An employee is not protected by Title VII when he violates legitimate company rules, knowingly disobeys company orders, disrupts the work environment of his employer, or willfully interferes with the attainment of the employer's goals." *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1446 (9th Cir. 1985). This is true of both opposition and participation clause cases. See *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 891 (7th Cir. 2004). A contrary rule would allow an employee to "immunize his unreasonable and malicious [acts] simply by filing a discrimination complaint with a government agency." *Id.*; *see also Wrighten*, 726 F.2d at 1355-56 (holding that "conduct of a disruptive nature, may exceed statutory protection"); *Silver*, 586 F.2d at 141 (holding that "the means of opposition . . . must be legal and reasonable in view of the employer's interest in maintaining a harmonious and efficient operation") (citation omitted).

Hellman contends that her disclosure of the two memoranda did not violate any rule of conduct because the judges themselves did not treat the memoranda as confidential. She alleges that Judge Weisberg discussed "all of the same information" contained in his November 23, 2005 memorandum with Judge Ehrlich's husband, Mr. Hair. This contrived argument fails because the conversation between Mr. Hair and Judge Weisberg occurred in February 2005, nine months before the memorandum was written. Moreover, dealing with the information was within the scope of Judge Weisberg's duties as a judge. In contrast, Hellman arrogated unto herself responsibilities that were not hers.

She also claims the memoranda lacked confidentiality because Judge Kessler allowed her to read Judge Weisberg's memorandum, and Judge Lankford let her read both Judge Weisberg's memorandum and his own response. But Judges Kessler and Lankford shared the memoranda with Hellman, a court employee, who was subject to the confidentiality obligations imposed on all court personnel. That disclosure does not defeat confidentiality. Moreover, neither Judge Kessler, Judge Lankford, nor anyone else, gave Hellman permission to disclose memoranda that were clearly marked "confidential." DSSOF ¶ 23.

Hellman argues that she was authorized to release the documents because Canon 3 of the Arizona Code of Conduct for Judicial Employees authorizes disclosure of confidential information to a law enforcement agency, and that the EEOC acts as a law enforcement agency.

But Hellman gave the documents to Pangerl, not a law enforcement agency. She placed no restrictions on Pangerl's use of the documents, DSSOF ¶¶ 27-28, and Pangerl did not give the documents to the EEOC for over a month. DSSOF ¶ 44.

Finally, Hellman claims that she was motivated to misappropriate the memoranda because she believed the Court of Appeals would not conduct an adequate investigation. She contends that this belief justified her release of the documents, even if they were confidential. She presents no evidence, however, to suggest that the memoranda would have been destroyed or hidden. The fact that the memoranda were available from other legitimate sources, including Judge Lankford and every other Court of Appeals judge, negates her justification for breach of her confidentiality obligations. Again, she was exercising a role that was not hers.

In sum, Hellman released confidential memoranda in clear violation of her employee obligations. The Court of Appeals had a legitimate and substantial interest in maintaining the confidentiality of personnel records, as well as inter-office communications between judges. Therefore, her unauthorized appropriation, copying, and dissemination of documents, without a showing that disclosure was necessary to preserve the documents, is not protected activity. Her Title VII claim fails on this basis alone. Title VII does not protect conduct that is otherwise unlawful or in violation of the employee's obligations to the employer.

B

We also conclude that Hellman has failed to establish that she suffered an adverse employment action. The United States Supreme Court recently considered the degree of harm required for an adverse action to fall within the scope of the anti-retaliation provision of Title VII. In *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 2409, 165 L. Ed. 2d 345 (2006), the Court held that the anti-retaliation provision "covers those (and only those) employer actions that would have been materially adverse to a reasonable employee." *Id.* In order to "separate significant from trivial harms" and inconvenience, Title VII protects individuals "not from all retaliation," but only from "retaliation that produces an injury or harm." *Id.* at 2414-15.

Hellman contends that she suffered adverse employment action in the form of (1) threats of termination and criminal prosecution, (2) verbal reprimands by Judge Kessler, (3) criticism by Judge Gemmill that she was untrustworthy, (4) suggestions by Judge Kessler that she not attend court events, and (5) ostracism by other staff and judges. Hellman claims that Judge Weisberg first threatened to unilaterally terminate her, and once he concluded that he did not have the authority to do so, he sought to pressure Judge Kessler to terminate her.

Although Hellman was threatened with termination and criminal prosecution, she was remarkably neither terminated nor prosecuted. It is undisputed that, other

than verbal reprimands from Judge Kessler, she was not disciplined for disclosing the confidential memoranda. While Judge Kessler chose not to terminate her, Title VII was not intended to chill justifiable discipline. The fear of litigation is an unintended consequence of remedial legislation such as Title VII, and at times deters employers from taking action that is otherwise indicated.

Judge Weisberg left her discipline to Judge Kessler. He never threatened to fire her. Even if he had, he had every reason to do so. Unfulfilled threats of termination and speculation about possible discipline do not constitute adverse employment action. *Nunez v. City of Los Angeles*, 147 F.3d 867, 874-75 (9th Cir. 1998) (stating that a supervisor's "scolding . . . and threatening to transfer or dismiss" an employee are not adverse employment actions). The judges' indirect threats of termination and criminal prosecution are insufficient to support a Title VII retaliation claim.

Similarly, neither Judge Kessler's reprimand, nor Judge Gimmel's criticism constitutes adverse employment action. Title VII does not insulate an employee from criticism, particularly where, as here, the criticism is warranted. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-81, 118 S. Ct. 998, 1002-03, 140 L. Ed. 2d 201 (1988) (holding that Title VII does not impose a "general civility code"); *Brooks v. City of San Mateo*, 229 F.3d 917, 929 (9th Cir. 2000) ("badmouthing" an employee does not constitute adverse employment action). In short, the court's weak

response to her egregious misconduct would not have deterred a reasonable employee from engaging in justifiable protected activity.

Finally, Title VII does not protect an employee from "mere ostracism" in the workplace. *Ray v. Henderson*, 217 F.3d 1234, 1241 (9th Cir. 2000); *Brooks*, 229 F.3d at 929 (ostracism suffered at the hands of coworkers does not constitute an adverse employment action). Co-worker snubbing, antipathy, petty slights, minor annoyances, and simple lack of good manners are not actionable. *Burlington*, 126 S. Ct. at 2415. Nor does Title VII cover "every offensive utterance by co-workers, because offensive statements by co-workers do not reasonably deter employees from engaging in protected activity." *Ray*, 217 F.3d at 1243. Indeed, Hellman admits that she was not dissuaded by the potential consequences of her actions. She acknowledged that she "wasn't concerned with what other people would think," DSSOF ¶ 25; she expected some adverse reaction to her conduct and was "okay with that." PSOF ¶ 15. Despite this knowledge, Hellman was undeterred from disclosing the confidential documents. The judges and employees justifiably lost confidence in her ability to respect them and the institution. Their reaction was the natural and probable consequence of her conduct. It was naive of her to have expected anything less. Her ostracism was self-imposed.

Appendix B

III

Hellman's claim under 42 U.S.C. § 1983 against Judge Weisberg asserts that he violated her First Amendment rights when he retaliated against her for disclosing the confidential memoranda. To establish a claim under the *First Amendment*, Hellman must show that (1) she engaged in constitutionally protected speech; (2) Judge Weisberg took adverse employment action against her; and (3) her protected speech was a "substantial or motivating" factor in the adverse action. *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576, 50 L. Ed. 2d 471 (1977).

Two inquiries guide interpretation of the First Amendment protection afforded public employee speech. *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 1958, 164 L. Ed. 2d 689 (2006) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35, 20 L. Ed. 2d 811 (1968)). The first considers whether the employee's speech involves a matter of public concern. If the answer is no, the employee's *First Amendment* claim fails. *Id.* (citing *Connick v. Myers*, 461 U.S. 138, 147, 103 S. Ct. 1684, 1690, 75 L. Ed. 2d 708 (1983)). If the answer is yes, the question becomes whether the employee's interest in speaking on matters of public concern is outweighed by the employer's interest in promoting the efficiency of the public service it performs. *Id.* This recognizes that government agencies have broader discretion to regulate the speech

of their employees than the speech of private citizens because the government has a significant interest in discharging its public duties efficiently. *Connick*, 461 U.S. at 140, 103 S. Ct. at 1686. "[W]here the government is employing someone for the very purpose of effectively achieving its goals, . . . restrictions [on speech] may well be appropriate." *Waters v. Churchill*, 511 U.S. 661, 675, 114 S. Ct. 1878, 1888, 128 L. Ed. 2d 686 (1994).

Whether a public employee's expressive conduct addresses a matter of public concern is determined in light of "the content, form, and context" of the expressive conduct. *Connick*, 461 U.S. at 147-48, 103 S. Ct. at 1690. "[W]hen government employees speak about corruption, wrongdoing, misconduct, wastefulness, or inefficiency by other government employees, their speech is inherently a matter of public concern." *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 926 (9th Cir. 2004) (citation omitted). This applies to litigation seeking to expose discrimination by public officials, "whether it consists of a single act or a pattern of conduct." *Id.*

Hellman contends that her disclosure of the two memoranda was protected speech because they addressed claims of discrimination, other misconduct, and potential mismanagement by elected officials in investigating claims. We conclude that Hellman's disclosure of the two confidential memoranda is only marginally related to issues of public concern. First, on its face, Judge Weisberg's memorandum exhibits no misconduct. He stated that "[b]ased upon the information and knowledge available to me, I do not

believe any of Pangerl's allegations." PSOF, exhibit D. Hellman's argument that this statement revealed that Judge Weisberg was improperly biased, had unfairly prejudged Pangerl, and was attempting to smear her reputation is not reasonably supported by the plain language of the memorandum. Judge Weisberg was entitled to express his opinion to his colleagues about Pangerl's claim. His opinion is prefaced with the caveat that it is "[b]ased upon the information and knowledge available to [him]," without suggesting, as Hellman alleges, that Judge Weisberg had conducted a full investigation. Judge Weisberg supported a continuing investigation by asking the other judges to "contact [him] immediately if [they had] any information relevant to Pangerl's Charge of Discrimination." *Id.* The memorandum cannot reasonably be construed as exhibiting an effort by Judge Weisberg to cover up or ignore Pangerl's claim, or government wrongdoing. He was discharging his duties by keeping his judicial colleagues advised of matters important to them.

Hellman contends that Judge Lankford's memorandum suggested that Judge Ehrlich had engaged in a pattern of misconduct at the Court of Appeals and that some of the judges knew of the misconduct, but did nothing to correct it. Judge Lankford stated that he was "extremely concerned that an ethical violation probably had occurred and that prior . . . reports of misbehavior involving Judge Ehrlich were more likely to be true." PSOF, exhibit D. He also expressed concern that the court was aware of Judge Ehrlich's misconduct, but failed to take action against her.

We cannot say that Judge Lankford's memorandum is "utterly devoid of public concern." *Voigt v. Savell*, 70 F.3d 1552, 1560 (9th Cir. 1995). The public has an interest in knowing whether its public officials treat employees in accordance with the law. However, this does not end our inquiry. "[T]he 'public concern' prong is a necessary, but not a sufficient, condition of constitutional protection. It merely brings the claim within the 'coverage' of the First Amendment." *Gilbrook v. City of Westminster*, 177 F.3d 839, 867 (9th Cir. 1999). Therefore, we apply the *Pickering* test and balance Hellman's interest in commenting on such matters against the Court of Appeals' interest in efficiently and effectively discharging its public service.

The critical question in applying the *Pickering* test is whether the employee's speech has undermined "the effective functioning of the public employer's enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S. Ct. 2891, 2899, 97 L. Ed. 2d 315 (1987)." In conducting this balancing, courts must give government employers 'wide discretion and control over the management of [their] personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch.'" *Gilbrook*, 177 F.3d at 867 (quoting *Connick*, 461 U.S. at 151, 103 S. Ct. at 1692). Factors include whether the speech (i) impairs discipline or control by superiors, (ii) disrupts co-worker relations, (iii) erodes a close working relationship premised upon personal loyalty and confidentiality, (iv) interferes with the speaker's performance of her or his duties, or (v)

obstructs the routine operation of the office. *Rendish v. City of Tacoma*, 123 F.3d 1216, 1224-25 (9th Cir. 1997).

The time, place, and manner of the employee's speech is relevant to whether the employer's operational efficiency was disrupted. *Voigt*, 70 F.3d at 1561. In Pickering, the Court noted that there might be some instances where speech, even if protected, might substantially disrupt "the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." 391 U.S. at 570, 88 S. Ct. at 1735. The "paradigm example of an environment in which a close working relationship is essential to perform successfully the public function" is the chambers of a judge. *Gregorich v. Lund*, 54 F.3d 410, 417 (7th Cir. 1995).

Here, Hellman did not simply reveal information she gathered about a co-worker's discrimination claim. Rather, she did so by misappropriating and then disclosing confidential memoranda between judges. In an environment where preservation of confidentiality is fundamental to the employer's operations, that sort of "speech" is highly disruptive. Hellman's chosen method of speech was unprofessional, disrespectful, and violated clearly established codes of conduct. Her method of speech caused significant disruption, including the deterioration of interpersonal relationships and the creation of mistrust and concern among other judges about the risks of sharing confidential information with the chambers in which she

worked. DSSSOF ¶¶ 112-119. Hellman admits that other judges avoided sharing confidential information with or visiting Judge Kessler's chambers and that they expressed concern that she would divulge confidential court information. *Id.* ¶ 113. Judge Weisberg was not required to "tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." *Connick*, 461 U.S. at 154, 103 S. Ct. at 1694. We conclude that the *Pickering* balancing test strongly favors Judge Weisberg and that Hellman has failed to establish that she engaged in constitutionally protected speech. A lawful end does not justify an unlawful means.

Moreover, we conclude that, even if Hellman had engaged in protected speech, she suffered no adverse employment action. In a First Amendment retaliation case, a cognizable adverse action is "an act that is reasonably likely to deter employees from engaging in constitutionally protected speech." *Coszalter*, 320 F.3d at 970. Where an employer's actions include "only minor acts, such as 'bad-mouthing,' that cannot reasonably be expected to deter protected speech, such acts do not violate an employee's First Amendment rights." *Id.* at 975-76 (citing *Nunez*, 147 F.3d at 875). We have already determined that court reaction to her disclosures was unbelievably restrained. Hellman was aware that her release of the documents would result in negative fallout, but that did not deter her. She suffered no cognizable adverse employment action.

Finally, Hellman has not shown that her "speech" was a "substantial or motivating factor" in any adverse action taken against her. Her allegedly protected speech involved the disclosure of confidential court documents. Where "the use of such inappropriate means of expression—rather than the speech itself—prompts discipline, there is no first amendment violation." *Wagner v. City of Holyoke*, 404 F.3d 504, 508 (1st Cir. 2005). Hellman has failed to show that any adverse action was motivated by her "speech," rather than her unauthorized disclosure of confidential court documents.

We conclude that Hellman has failed to establish that she engaged in protected activity by disclosing the confidential memoranda or that she suffered a cognizable adverse employment action. Therefore, her *section 1983* claim fails.

IV

IT IS ORDERED GRANTING defendant State of Arizona's motion for summary judgment (doc. 54) and **DENYING** Hellman's cross-motion for summary judgment (doc. 111).

IT IS FURTHER ORDERED GRANTING defendant Weisberg's motion for summary judgment (doc. 55) and **DENYING** Hellman's cross-motion for summary judgment (doc. 77).

IT IS FURTHER ORDERED DENYING defendants' motion to dismiss the emotional distress damages claim as moot (doc. 87), and **DENYING** defendants' motions to supplement their motion to dismiss as moot (docs. 128, 143).

IT IS FURTHER ORDERED GRANTING defendants' motion to file supplemental authority (doc. 148), and **DENYING** defendants' motion to strike as unauthorized by the Federal Rules of Civil Procedure (doc. 130).

The clerk shall enter final judgment for defendants.

DATED this 29th day of November, 2007.

/s/ Frederick J. Martone
Frederick J. Martone
United States District Judge

APPENDIX C — LETTER FROM KAREN L. FERGUSON, SUPERVISORY CIVIL RIGHTS ANALYST, EMPLOYMENT LITIGATION SECTION, U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION TO LUZ M. HELLMAN DATED APRIL 27, 2007

U.S. DEPARTMENT OF JUSTICE
Civil Rights Division

NOTICE OF RIGHT TO SUE
WITHIN 90 DAYS

950 Pennsylvania Avenue, N.W.
Karen Ferguson, EMP, PHB, Room 4239
Washington, DC 20530

April 27, 2007

CERTIFIED MAIL
5053 1720

Ms. Luz M. Hellman
c/o Stephen J. Montoya, Esquire
Law Offices of Montoya & Jimenez
3200 N. Central Ave., Ste.2550
Phoenix, AZ 85012-2490

Re: EEOC Charge Against Arizona Court of Appeals
No. 540200702036

Appendix C

Dear Ms. Hellman:

Because you filed the above charge with the Equal Employment Opportunity Commission, and the Commission has determined that it will not be able to investigate and conciliate that charge within 180 days of the date the Commission assumed jurisdiction over the charge and the Department has determined that it will not file any lawsuit(s) based thereon within that time, and because you through your attorney have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq., against the above-named respondent.

If you choose to commence a civil action, such suit must be filed in the appropriate Court within 90 days of your receipt of this Notice.

This Notice should not be taken to mean that the Department of Justice has made a judgment as to whether or not your case is meritorious.

Sincerely,

Wan J. Kim
Assistant Attorney General
Civil Rights Division

by s/ Karen L. Ferguson

Karen L. Ferguson
Supervisory Civil Rights Analyst
Employment Litigation Section

cc: Phoenix District Office, EEOC
Arizona Court of Appeals

APPENDIX D — LETTER FROM WILLIAM RYAN, ENFORCEMENT SUPERVISOR, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TO LUZ M. HELLMAN WITH DISMISSAL AND NOTICE OF RIGHTS DATED MARCH 9, 2006

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Phoenix District Office

3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012-2504
(602) 640-5000
TTY (602) 640-5072
FAX (602) 640-5071

Ms. Luz M. Hellman
11607 North 12 Terrace
Phoenix, AZ 85020

Subject: Dismissal of Charge
Charge Number: 540-2006-00021

Dear Ms. Hellman:

We have completed a preliminary review of your case. At this time, the information in the file does not indicate that any further investigation of your case would necessarily result in any finding of discrimination. Consequently, we have decided that the Equal Employment Opportunity Commission (EEOC) will not investigate this case any further. This letter, and the enclosed documents, will dismiss your case from further action by the EEOC.

Appendix D

This dismissal is not a statement on the merits of your case. You still have rights under Federal law to privately pursue this matter in Federal Court. We have enclosed a Dismissal and Notice of Right to Sue form with this letter. This form will explain your rights. Please note that *you have only 90 days from the date that delivery of the Notice was attempted at your last known address of record or 90 days of receipt of the Notice, whichever is earlier, to file suit in Federal Court, or you will lose your right to file a lawsuit against the respondent named in your charge.*

Sincerely,

s/ William Ryan
William Ryan
Enforcement Supervisor

MAR 09 2006
Date

Enclosure

Appendix D

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To: Ms. Luz M. Hellman
11607 North 12 Terrace
Phoenix, AZ 85020

From: U.S. Equal Employment Opportunity Commission
3300 North Central Avenue, Suite #690
Phoenix, Arizona 85012-1848

Charge Number 540-2006-00021

EEOC Representative William W. Ryan, Supervisor

Telephone Number (602) 640-5012

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

* * *

[X] The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This oes not certify that the respondent is in compliance with the statutes.

Appendix D

No finding is made as to any other issues that might be construed as having been raised by this charge.

* * *

On behalf of the Commission

s/ Chester V. Bailey
Chester V. Bailey, District Director

MAR 09 2006
(date mailed)

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 1, 2010

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 08-15059

DC No. CV 06-1465 FJM

LUZ HELLMAN,

Plaintiff - Appellant,

v.

SHELDON WEISBERG; STATE OF ARIZONA,

Defendants - Appellees.

ORDER

Before: TASHIMA, GRABER, and BYBEE, Circuit Judges.

Judges Graber and Bybee vote to deny the petition for rehearing en banc and Judge Tashima so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f).

The petition for rehearing en banc is denied.

APPENDIX F — 42 U.S.C. § 2000e-3

42 U.S.C. § 2000e-3

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

APPENDIX G — 42 U.S.C. § 1983

42 U.S.C. § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.